

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Nathan J. Paulson
CLERK

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,548

626

ALEXANDER OSTROWER,

Appellant,

v.

BERTHA JAEGER RUGERS,

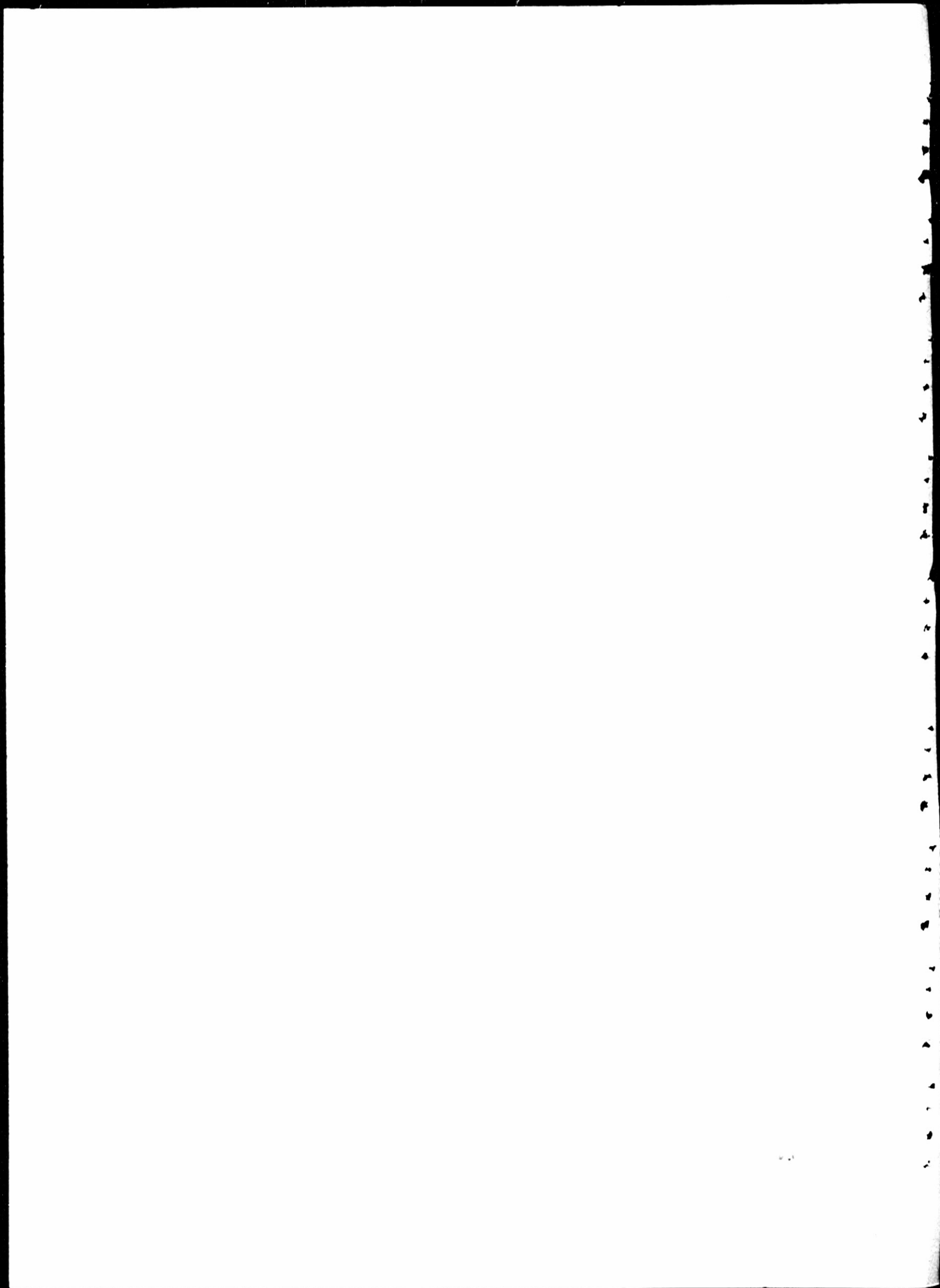
Appellee.

Appeal from the United States District Court
for the District of Columbia

HERMAN MILLER

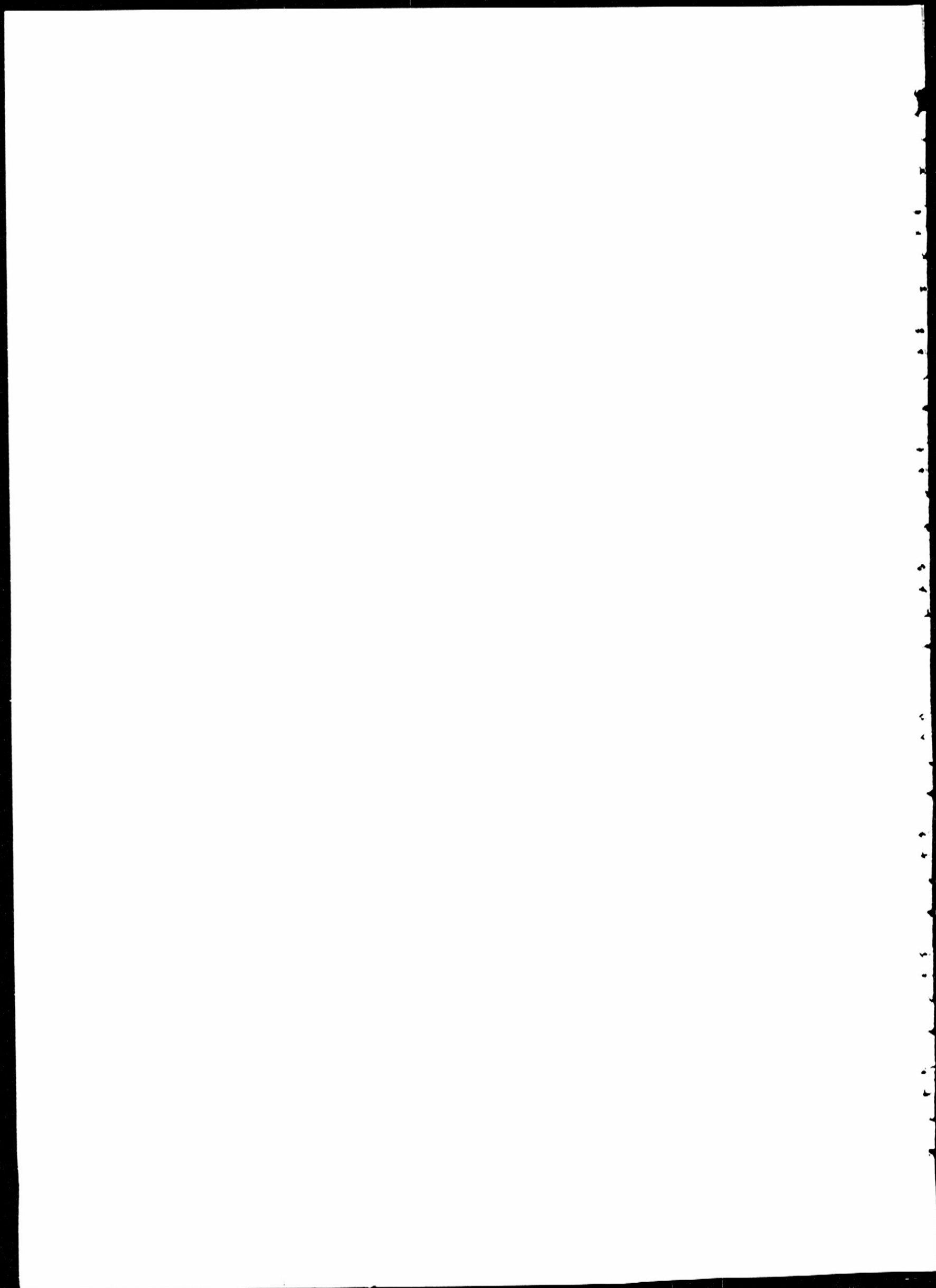
421 4th Street, N. W.
Washington, D. C.

Attorney for Appellant.



QUESTION PRESENTED

The question presented is whether summary judgment can be granted against the appellant, where his affidavits claim he submitted a written contract to the appellee's agent to buy for \$30,000.00 all cash, and when this offer is rejected, at suggestion of appellee's agent authorized such agent to change said written offer over his signature to \$37,500.00, which said agent does, and the said agent secures the vendee appellee's signature on another similar contract, under the exact terms, conditions, and for the same price as the one the appellant had signed and as authorized by him to be changed, and the appellee-vendee's agent notifies the appellant that the appellee had signed and accepted such new offer?



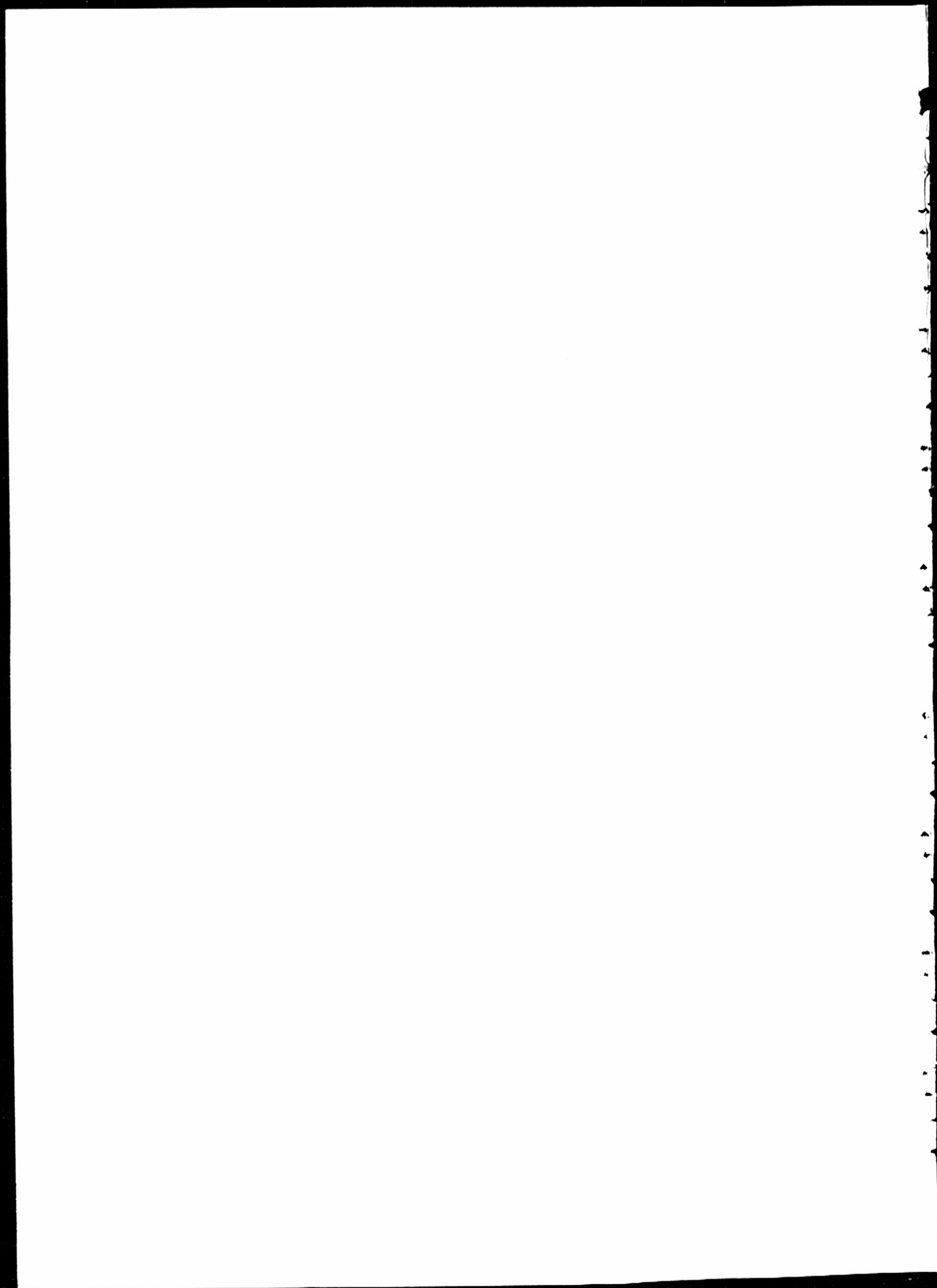
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,548

ALEXANDER OSTROWER,

Appellant,

v.

BERTHA JAEGER RUGERS,

Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The action in the District Court was for specific performance of a realty contract wherein the appellant was purchaser, and the appellee was vendee, involving District of Columbia property.

The District Court had jurisdiction under the provisions of Title 11, Section 305 D. C. Code, 1961 Ed., Supp. 11, and presently re-codified in Public Law 88 - 243, 88th Cong. 1st. Sess., Title 11-521, therein.

This Court has jurisdiction under the provisions of the aforesaid Public Law 88, Title 11-321.

STATEMENT OF THE CASE

The appellant filed his complaint against the appellee, stating in substance that on or about November 19, 1963 the parties entered into a written contract whereby the appellee agreed to sell to the appellant the real property located in the District of Columbia known as 1113-15 10th Street, N.W., Lot 818 Square 369, for \$37,500.00 all cash, and the appellant deposited with the appellee's agent his check for \$2,000.00 as earnest money. Contract provided, among other things, that settlement was to be made in 60 days from date of acceptance, and the acceptance made on the aforesaid date made it a binding contract. After notification of such acceptance by said appellee, her agent then informed appellant that the appellee refused to carry out the contract and the sale was off, and the deposit was returned to the appellant. By reason thereof the appellee breached the contract and specific performance was requested. (J.A. 1, 2).

The appellee did not file an answer but filed a motion for summary judgment, claiming there was no material issue of fact, and the appellee was entitled to a judgment, as a matter of law. This motion was accompanied by two affidavits, one of the appellee, and one of her agent. (J.A. 2, 3, 4).

The affidavit of the appellee claimed that at no time did she enter into any type of contract with appellant; that she spoke with appellant by phone on one occasion during the summer of 1963, and instructed the appellant to contact her attorney and she never authorized any agent except her attorney to act for her or represent her in any dealings. Her attorney (the person who the appellant claims was the appellee's agent) stated that during the summer of 1963 he received a call from appellant regarding the property and he informed appellant the property was not on the market. After several phone conversations with him, the appellant came to his office and offered \$30,000.00, executing a form of contract and left a deposit of \$1,000.00. He subsequently informed the appellant this offer was not acceptable. (J.A. 3, 4).

Thereafter appellant orally advised him that the offer would be increased to \$37,500.00 and put up a deposit of \$2,000.00. On November 19, 1963 appellee's said agent informed appellant by phone that this offer was acceptable to appellee, and an appointment was made for appellant to come to said agent's office at 2:00 P.M. on November 20, 1963. On this last day the appellant was advised that a verbal offer of \$41,000.00 had been made and a contract and deposit on this offer would follow, and therefore appellant's last offer could not be considered. This affidavit further stated that appellant was further informed that appellee had delivered to said agent a signed contract for sale of said property with instructions to deliver it to the purchaser making the highest offer, but not less than \$37,500.00, and then said agent returned the first written offer of \$30,000.00 with the \$1,000.00 check. However, the appellant insisted on leaving with said agent check for \$2,000.00 payable to order of said agent which was subsequently returned to the appellant, by mail. (J.A. 3, 4).

Appellee also filed a statement in which she claimed there was no material issue of fact. (J.A. 5).

In opposition to these affidavits of the appellee, the appellant executed his own affidavit, and that of an associate. (J.A. 6, 7, 8).

The appellant's affidavit, in substance, stated:

On suggestion of the appellee he was referred to her attorney and agent, with whom he discussed the purchase of the property, and as a result he visited appellee's agent's office where said agent, acting for the appellee, prepared a written contract in handwriting whereunder the price was \$30,000.00 all cash with settlement in 30 days from acceptance by appellee, and a deposit of \$1,000.00 was given said agent. Thereafter the agent called the appellant and stated the appellee was in his office, and all of the terms and conditions of the appellant's offer were acceptable, except the appellee wanted \$40,000.00. This appellant thereafter increased his offer to \$37,500.00 all cash with a new deposit of \$2,000.00

as suggested by appellee's agent, and the appellant then authorized the appellee's agent to make these changes in the written offer which the appellant theretofore signed and left with the agent which authorized change was to increase the price to \$37,500.00 all cash with a \$2,000.00 deposit.

The appellant deposed further that on the same day, late in the afternoon, he was informed by the appellant's agent that the appellee had accepted said written offer which he last made, and that the agent had the appellee sign her name to another form of contract which conformed in all respects to the appellant's new contract which he authorized to be changed to \$37,500.00 all cash with a \$2,000.00 deposit, and the agent then invited the appellant to come to his office the following day to leave the \$2,000.00 deposit and pick up a copy of the contract signed by the appellee. He stated he then visited appellee's agent's office and left the \$2,000.00 deposit as agreed. Appellee's said agent, however, refused to release the contract signed by the appellee which was then in his possession unless the price was further increased to \$40,000.00, because the appellee had, in the meantime, received another offer of \$40,000.00 after she had accepted appellant's offer of \$37,500.00.

The appellant's additional affidavit of Hyman Zoslow stated he listened on an extension phone to a conversation between Brainard Warner III, the appellee's agent, and the appellant in which said agent confirmed the acceptance by the appellee of the appellant's offer to purchase her property for \$37,500.00, all cash, settlement in 60 days and that the said appellee had signed said contract of sale in her agent's office and the deposit of \$2,000.00 was to be delivered the next day to said agent. This affiant stated he recognized the said agent's voice with whom he had previous conversation the same day. (J.A. 6, 7, 8).

The appellant also filed a statement in which he claimed there were material issues of fact. (J.A. 5, 6).

The Court granted the appellee's motion and entered an order and judgment dismissing the complaint on the merits. (J.A. 8)

From this order and judgment, the appellant noted his appeal. (J.A. 9)

STATEMENT OF POINTS

The points relied on by the appellant in this appeal are as follows:

1. The appellee, as a matter of law, was not entitled to the granting of a summary judgment.
2. The pleadings, affidavits and exhibits presented an issue of fact for which judgment was not grantable.

SUMMARY OF ARGUMENT

1. Giving the best inferences to appellant, based on the affidavits it was clear that on the facts set forth in appellant's affidavits, he was entitled to specific performance. The parties had agreed as to price and all terms; the appellant had authorized the appellee's agent to increase the written offer made by him to \$37,500.00; the appellee had signed another paper which was exactly similar to the one bearing the appellant's signature, which, when read together, constituted the contract; and notification was made by appellee's agent to the appellant that his written contract had been signed and accepted by the appellee, which entitled appellant to the property. The facts set forth in appellee's affidavits factually controvert appellant's claim. This makes the matter an issue of fact.

ARGUMENT

1. There were controverting affidavits. In granting summary judgment, the Court had to conclude that the matters and facts set forth in appellant's complaint and supporting affidavits did not constitute a prima facie case. Then, considering this question, the following is appropriate.

2. It is not necessary in concluding a contract involving realty that a single paper be signed by both parties. A series of telegrams, letters each referring to the other is sufficient. In this case the appellant had signed a written contract. Originally it was for \$30,000.00 with \$1,000.00 deposit. When appellee's agent informed appellant this was insufficient, the appellant authorized appellee's agent to change this written contract by increasing the price to \$37,500.00 with a \$2,000.00 deposit, which changes the said agent made. The exhibit in the appendix clearly shows this. Thereupon, appellee's agent decided to type another contract exactly similar to the one which appears in the appendix, so it would present a clean contract without showing changes. This exact similar contract the appellee signed, as both, being exactly the same, expressed the meeting of the minds on all essentials; and when appellee's agent notified the appellant that his principal had accepted and signed his offer, the contract became complete and binding.

The Statute of Frauds is sufficiently satisfied. It is not necessary that the writing have both signatures on the same paper.

The case of *Ochs v. Weil*, 79 U.S. App. D.C. 84, 142 F.2d 758, is clear authority that it is not necessary that the memorandum be signed by both parties, but that a series of telegrams relating to each other is sufficient to take the contract out of the Statute. It was held in this case that a complete binding contract resulted which may be gathered from letters, writings and telegrams between the parties relating to the property when they are so connected with each other that they may be thoroughly deemed to constitute one paper regarding the contract.

In the instant case, the appellant had authorized the appellee's agent and attorney to modify and change the written offer which he had previously signed and which was given to the appellee's said agent and which changes, pursuant to such authority, the agent and attorney made. When the appellee signed another form of contract exactly similar and conforming to the changed offer made by the appellant, each of these two writings are referable to each other, one in which the appellant made the offer signed by him and the other containing the exact same information signed by the appellee would satisfy the Statute. To the same effect see *Barry v. Coombe*, 26 U.S. 640, 7 L.Ed. 295, and *Shell Eastern Petroleum Products v. White*, 62 App. D.C. 332, 68 F.2d 379.

In the light of the requirement for summary judgment, under the facts set forth in the affidavits, it is clear at this particular posture that an issue of fact at least with respect to the existence of the contract was presented.

On the question dealing with delivery, the appellee cites *Greenfield v. Murray*, 117 A. 2d 227, D.C. Mun. App. This case has no application due to the fact that one of the parties did not actually sign the paper writing. Therein, the purchaser, who brought the action, produced only a carbon copy of a contract bearing his signature but which did not bear the vendor's signature; the Court held that this only amounted to an offer and of course was unenforceable within the Statute against the vendor.

However, in our case, the parties both had signed the paper writing, each referable to the other, and in such case they may be considered as one and the same instrument. See the case of *Cafritz Construction Co. v. Mudrick*, 61 App. D.C. 189, 59 F.2d 864.

The appellee also cites the case of *Bell v. Morgan*, 91 U.S. App. D.C. 65, 199 F.2d 168. This case actually did not deal with the question. The only thing that the case decided was that, after the summary judgment had been entered, it was not error for the Court to refuse the

filing of an amended complaint alleging, instead of an agreement in writing, an agreement evidenced by a memorandum in writing. The Court held that the matter was not a contract in that it was only a memorandum signed by the purchaser and nowhere was it signed by the appellee; consequently, this case has no connection with the question.

The appellee claims that there was no delivery. However, better stated, it is that there was no communication of acceptance. The affidavits clearly show that the appellant spoke to the appellee's agent and attorney, who informed the appellant that the appellee had accepted the offer. This was sufficient communication. Almost the same situation existed in the case of *Braun v. Yaffee*, 193 A. 2d 895 D.C. Mun. Ct. of App. In that case, succinctly, the purchasers gave to the agent and broker of the vendor their written offer to buy. The vendor signed the offer and accepted it and gave it to his own agent for delivery to the buyer. While the papers were in possession of the vendor's agent, the purchasers attempted to call the agent by phone for the purpose of withdrawing their offer. Finally, one of the purchasers succeeded in talking to the vendor's agent over the phone whereupon, immediately, the agent informed this purchaser that the contract had been accepted and then immediately the buyer said to the agent that they, the buyers, were withdrawing their offer. In that case, just as in this case, the communication of the acceptance of the offer to the buyers was made by phone. In the litigation that resulted, the issue was whether an acceptance had been delivered. The District of Columbia Court of Appeals held that there was a communication of the acceptance. The Court, in its opinion, cited Restatement Contracts, par. 41 (1932), as follows:

"Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer."

To the same effect is Restatement (Second Law of Agency) par. (1958):

"To constitute ratification, the affirmance of a transaction must occur before the other party has manifested his withdrawal from it either to the purported principal, or to the agent and before the offer or agreement has otherwise terminated or been discharged."

In the light of the *Braun* case where the vendor's agent by phone informed the buyer that the contract had been accepted by the seller this was sufficient communication from which the buyer in that case could not withdraw and consequently made the converse of this rule to be binding upon the appellee.

The case in the District of Columbia Court of Appeals was decided November 20, 1963, is to the same effect. *Dunn v. Shane*, 195 A. 2d 409. That case arose under a claim for a real estate commission, the broker claiming that he was entitled to one half of the deposit or to a commission, in which case, the trial Court found no binding contract existed. A vendor engaged the broker to sell her house and he presented her with a contract from a buyer for \$50,000.00 all cash. The vendor agreed to the terms and signed the paper which the broker took to the buyer for his signature. The buyer then signed, but over his signature made a statement that the signing was conditioned upon obtaining a first trust loan of \$35,000.00 and certain terms specified. The broker then called the vendor and told her of this conditional acceptance and in response to her inquiry, he said it was not necessary for her to initial the changes made by the buyer. The buyer had difficulty in securing this loan and so informed the broker, and he also asked the broker if the vendor had accepted this condition regarding the loan, but he could get no definite answer from the broker and on a second occasion could not get a definite assurance from the broker that the vendor had accepted this condition. He thereupon informed the broker that he was

withdrawing his counter-offer. In the meantime, the vendor had gone to the Virgin Islands *unknown* to the broker, the vendor had authorized her mother to initial the change in the contract if necessary. After the buyer told the broker of the withdrawal of the offer, the broker went to a building association and obtained the approval of a loan for the buyer in the amount and on the terms specified except that the loan was conditioned upon the buyer's wife being a co-maker. When the buyer was informed of this by a letter from the broker, he called the broker and told him that he had previously, orally, withdrawn his offer and that he would do so in writing if that was not sufficient. He then wrote a letter to the broker stating that since the seller had never accepted the offer, he was withdrawing it. He further stated that the loan company requirement that his wife sign, did not meet his conditions. On the same day, the buyer stopped payment of the check. The broker received this letter the day after it was mailed and earlier that day had the vendor's mother initialed the condition the buyer had made on his offer, thereupon the broker ordered title examination and fixed the day for settlement. On that date, the vendor appeared ready to complete the sale but the buyer did not, and thereafter the vendor resold the property to another purchaser for \$50,750.00. The Court said that until the seller had accepted the contingencies, there was no contract and although the changes were apparently acceptable to the seller, the broker refrained from having her formally accept until after the buyer's oral notice of withdrawal. The Court said that the acceptance by the vendor occurred earlier on the same date as the letter of revocation was received but her acceptance was not communicated to the buyer until long after the letter of revocation had been received. The Court held that the uncommunicated acceptance did not prevent the revocation from becoming effective and stated as follows:

"The rule appears to be that, in cases like this, an acceptance is not effective until communicated to the offeree. The rule, correctly stated in 1 Corbin

Contracts Par. 67 p. 277 is that where the offeror has specified no mode of acceptance but 'the offer is of such a kind that the offeror needs to know of the acceptance in order to determine his subsequent acts, and the offeree has reason to know this, a notice of acceptance must be given'. Here the offeror, the buyer needed to know the acceptance in order that he could procure with assurance in his attempt to obtain a loan and it is obvious that the broker knew this."

It is obvious under this statement that since in our case there is no mode specified for communication of acceptance no particular form is necessary and consequently, the telephone conversation between the appellant and the appellee's agent and broker, to the effect that the appellant's amended offer as changed over his signature at a time when the appellee had signed such an acceptance was sufficient to communicate the acceptance and when it was done, a binding contract resulted.

CONCLUSION

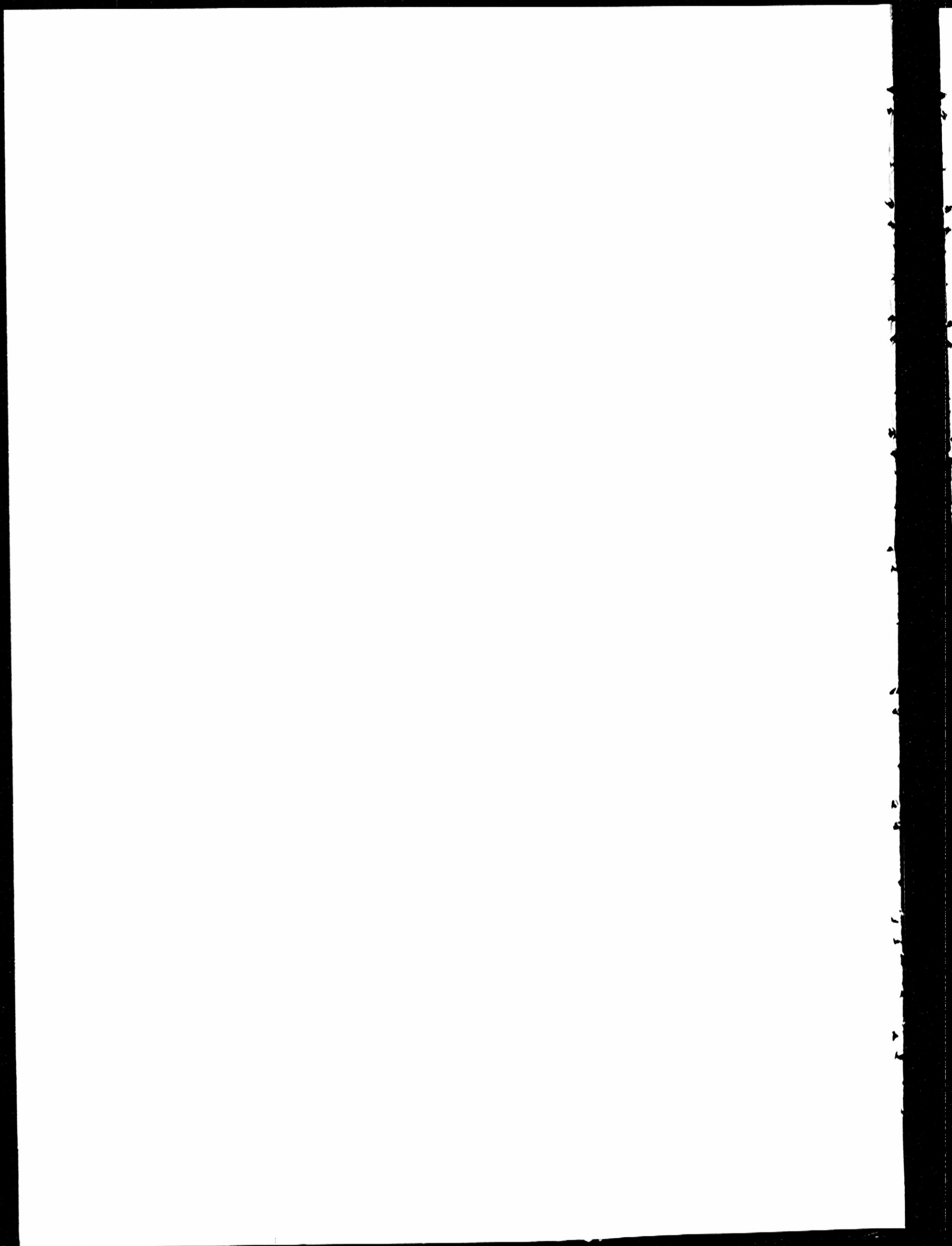
It is respectfully urged that the judgment of the lower court be reversed, and the case remanded for a trial on the merits.

Respectfully submitted,

HERMAN MILLER

421 4th Street, N. W.
Washington, D. C.

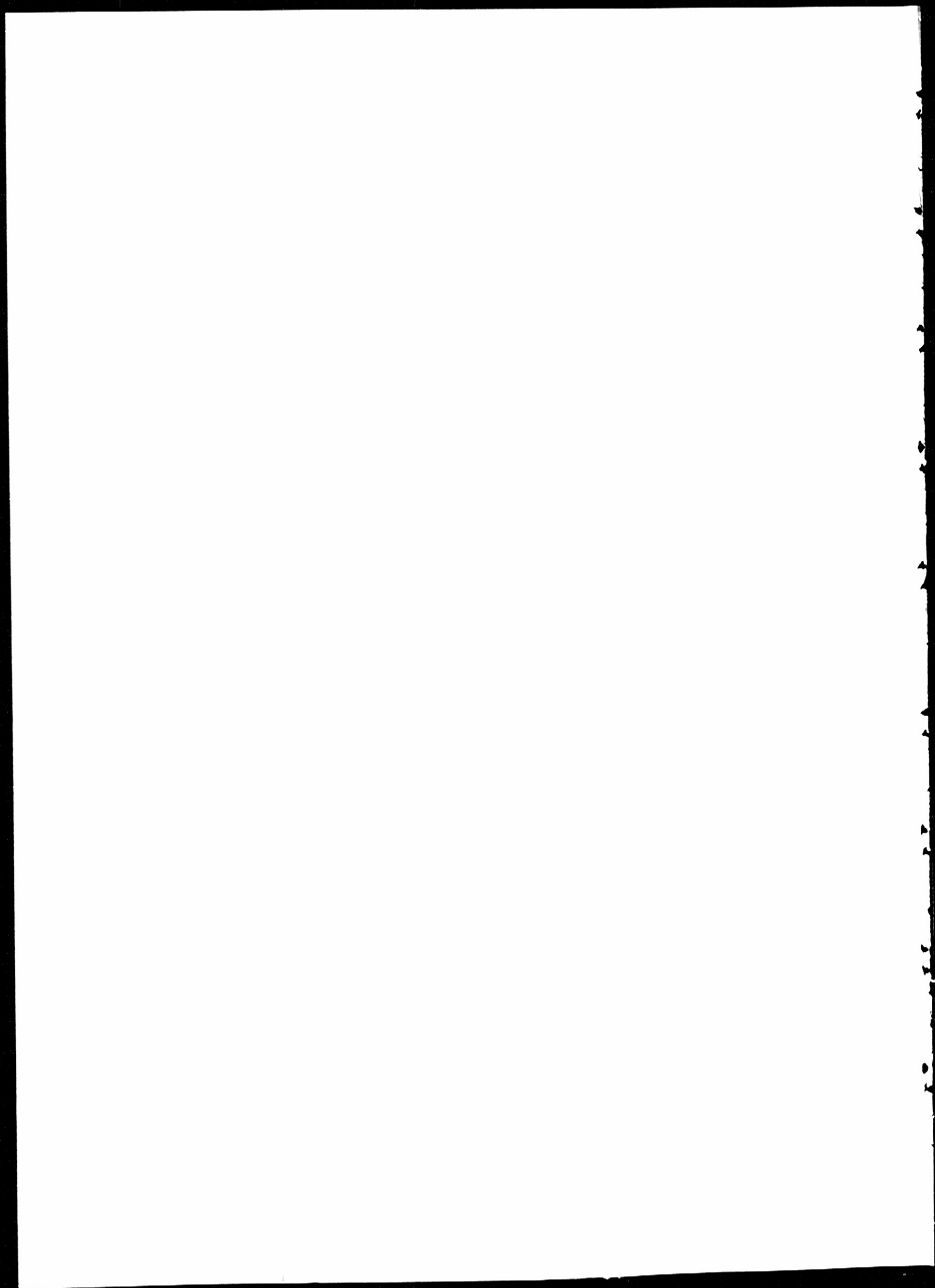
Attorney for Appellant



(i)

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JOINT APPENDIX

[Filed December 2, 1963]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALEXANDER OSTROWER)
1722 Poplar Lane, N.W.)
Washington, D. C.)

Plaintiff)

v.)

Civil Action 2878-'63

BERTHA JAEGER RUGERS)
2727 29th Street, N. W.)
Washington, D. C.)

Defendant)

COMPLAINT FOR SPECIFIC PERFORMANCE AND DAMAGES

The complaint of the plaintiff for specific performance of a contract for the sale of realty and damages against the defendant shows unto the Court as follows:

1. The jurisdiction of the Court is based upon its general equity powers and its exclusive jurisdiction involving title to real estate; and the plaintiff's claim exceeds the sum of \$10,000.00, and therefore, this action is within the exclusive jurisdiction of this Court.

2. The parties are both adult citizens of the United States and residents of the District of Columbia and they are not under any legal disability.

3. Heretofore, to wit: November 19, 1963, the parties entered into a written contract whereby the defendant agreed to sell to the plaintiff real property located in the District of Columbia known as 1113-1115 - 10th Street, N. W. being Lot numbered eight-hundred and eighteen

(818) in Square numbered three-hundred and sixty-nine (369) for the sum of \$37,500.00, all cash, and the plaintiff thereupon deposited with the defendant's agent his check in the sum of \$2,000.00 as earnest money. Said contract provided, among other things, that settlement was to be made within sixty days from the acceptance thereof which acceptance the defendant made on the aforesaid date, and thereupon said contract became a binding agreement between the parties.

4. The plaintiff further says that after the notification to him by the defendant's agent of said acceptance by the defendant he was informed the defendant refused to carry out said contract and informed this plaintiff that the contract was off and the defendant's agent returned the deposit to the plaintiff. The plaintiff says that by the defendant's action, the defendant has now breached her said contract to sell and convey said property to the plaintiff, and the plaintiff is informed and therefore avers that he is entitled to maintain this action against the defendant for specific performance of said contract and for damages.

WHEREFORE, the premises considered, the plaintiff prays for (1) process; (2) for judgment against the defendant for specific performance of the aforesaid contract, which contract this plaintiff is ready, willing, and able to perform, (3) for a judgment against the defendant in the sum of \$25,000.00 as damages for said breach, (4) attorney's fees and costs, (5) and for general relief.

/s/ Herman Miller
421 Fourth Street, N. W.
Attorney for the plaintiff

[Filed December 13, 1963]

MOTION FOR SUMMARY JUDGMENT

Defendant, BERTHA JAEGER RUGERS, moves the Court for Summary Judgment in her favor against Plaintiff, ALEXANDER OSTROWER, on grounds that there is no genuine issue as to any material fact and that Defendant is entitled to judgment as a matter of law. In support of her

Motion, Plaintiff annexes hereto Affidavits of Plaintiff, BERTHA JAEGER RUGERS, and her attorney, BRAINARD H. WARNER, III.

KASLOW AND WARNER

By /s/ Brainard H. Warner III
Attorneys for Defendant
919 - 18th Street, N. W.
Washington 6, D. C.
296-4300

[Certificate of Service]

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH, ss:

BERTHA JAEGER RUGERS, being first duly sworn according to law on oath deposes and says that she has personal knowledge of the facts hereinafter set forth and that she makes this Affidavit in support of her Motion for Summary Judgment herein and states as follows:

That at no time did she enter into any type of contract with the Plaintiff, written or oral; that this affiant spoke by telephone with the Plaintiff on one occasion during the summer of 1963 and instructed Plaintiff to contact her attorney, Brainard H. Warner, III and that affiant has never authorized any agent or anyone except her attorney, Brainard H. Warner, III, to act for or represent her in any dealings with the Plaintiff.

/s/ Bertha Jaeger Rugers

[JURAT dated Dec. 9, 1963]

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

BRAINARD H. WARNER, III, being first duly sworn according to law on oath, deposes and says that he has personal knowledge of the facts hereinafter set forth and that he makes this Affidavit in support of Defendant's Motion for Summary Judgment herein and states as follows:

That during the summer of 1963, this affiant received a telephone call from Plaintiff regarding his desire to purchase premises 1113-1115 - 10th Street, N.W. Affiant advised Plaintiff that Defendant did not have the property on the market and was not interested in selling said property at this time. After several telephone conversations, Plaintiff came to affiant's office at 919 - 18th Street, N.W. and offered to purchase said property for a total price of \$30,000.00, executing a form contract for the same with a check for \$1,000.00. Subsequently, affiant advised Plaintiff that said offer was not acceptable to the Defendant.

Thereafter, Plaintiff orally advised affiant that Plaintiff would increase his offer to \$37,500.00 and put up a deposit of \$2,000.00. On November 19, 1963, affiant advised Plaintiff by telephone that this offer was acceptable to Defendant and Plaintiff made an appointment to come to affiant's office at 2:00 P.M. on November 20, 1963. On November 20, 1963, affiant advised Plaintiff that a verbal offer of \$41,000.00 had been made for said property and a contract and deposit would follow and that in view thereof, affiant could not consider any contract from Plaintiff for a lesser amount.

Affiant further advised Plaintiff that Defendant had delivered to affiant, as her attorney, a signed contract for said property with instructions to deliver the contract to the purchaser making the highest offer, but in no event, less than \$37,500.00. Affiant then returned to the Plaintiff the aforementioned \$30,000.00 contract and check. Plaintiff insisted on leaving with affiant his check in the amount of \$2,000.00, payable to the order of affiant, which check was subsequently returned to Plaintiff by mail; and that to the best of affiant's knowledge, information and belief, the Defendant never entered into a written contract with the Plaintiff for the sale of real property located in the District of Columbia, known as 1113-1115 - 10th Street, N.W., being Lot numbered 818 in Square numbered 369.

/s/ Brainard H. Warner, III

[JURAT dated Dec. 13, 1963]

[Filed December 13, 1963]

STATEMENT OF MATERIAL FACTS

There is no genuine issue as to any of the following material facts:

1. There is no written contract for the sale of premises 1113-1115 - 10th Street, N. W., in the District of Columbia to the Plaintiff signed by the Defendant.
2. There was no delivery to the Plaintiff of any contract for the sale of real estate signed by the Defendant.

Respectfully submitted,

KASLOW AND WARNER

By /s/ Brainard H. Warner III
Attorneys for Defendant

* * *

[Filed January 10, 1964]

STATEMENT OF FACT UPON WHICH THERE IS A MATERIAL ISSUE

There is a material issue of fact presented by the defendant's motion for summary judgment.

The defendant avers that she did not enter into any type of contract with the plaintiff, written or oral.

The plaintiff, by his affidavit, avers that the defendant, agent and attorney, informed him, the plaintiff, that the said agent and attorney had in his possession, a contract signed by the defendant in conformity with the written offer made by this affiant and by which this affiant authorized the said agent and attorney to change and increase.

The affidavit of the defendant's agent does not make any statement as to his changing the written offer made by the plaintiff after the plaintiff had authorized him to do so, increasing the offer from \$30,000.00 to \$37,500.00 and increasing the deposit from \$1,000.00 to \$2,000.00.

The plaintiff's affidavit asserts that the defendant's agent and attorney was authorized to make these changes which the said agent and attorney in fact did.

The defendant's attorney and agent's affidavit made herein admits that the defendant signed a contract accepting the offer of \$37,500.00 as incorporated in the plaintiff's affidavit.

The plaintiff's affidavit shows that the attorney and agent for the defendant informed the plaintiff that his said modified offer increasing the price to \$37,500.00 had been accepted and a copy of said acceptance would be delivered to him. The affidavit of the agent and attorney for the defendant makes no recitation concerning this claim by the plaintiff, consequently, there are issues of fact dealing with (1) the question of the authorization and fact of modifying and changing the plaintiff's written offer increasing the price to \$37,500.00 with a \$2,000.00 deposit, (2) an execution by the defendant by placing her signature on a formed copy accepting the plaintiff's offer, (3) notification by the defendant's agent and attorney to the plaintiff that said offer of \$37,500.00 had been accepted and that the defendant had in fact signed such a written contract.

/s/ Herman Miller

* * *

Attorney for the Plaintiff

[Filed January 10, 1964]

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Hyman Zoslow, first being duly sworn on oath deposes and states that he was listening on the extension phone to the conversation between the plaintiff in this case, Alexander Ostrower, and Brainard H. Warner III when the said Warner called the plaintiff and confirmed the acceptance by defendant of plaintiff's offer for the purchase of the defendant's premises, 1113-15 Tenth Street, N. W. for the price of \$37,500.00 all cash, settlement within 60 days, and that the said Bertha Jaeger Rutgers had signed in said Brainard H. Warner's office, the contract of sale as

the seller and that the deposit was to be \$2,000.00 delivered the following day by the plaintiff to the office of Mr. Warner. The affiant further said that he well recognized the voice of Mr. Warner with whom he had a previous conversation the same day.

/s/ Hyman Zoslow

[JURAT dated January 10, 1964]

[Filed January 10, 1964]

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Alexander Ostrower first being duly sworn, on oath deposes and says that he is the plaintiff herein, and he makes this affidavit upon his own personal knowledge.

He states that upon the suggestion of the defendant, Mrs. Bertha Jaeger, this affiant was referred to her attorney and agent, Mr. Brainerd H. Warner III, with whom he discussed his purchase and her sale of premises belonging to the defendant located at 1113-15 - 10th Street, N.W., Washington, D. C., and which property was adjacent to property belonging to this plaintiff. As a result of these discussions this affiant visited Mr. Brainerd at his office, where the said Warner, acting as defendant's attorney and agent, prepared a written contract, in the handwriting of Mr. Warner, whereby the affiant agreed to purchase said premises for the sum of \$30,000.00 all cash, with settlement in 30 days after acceptance by defendant, and this affiant left with Mr. Warner a check in sum of \$1,000.00 to act as a deposit, payable to order of Brainerd H. Warner, Atty.

Thereafter the said Brainerd H. Warner III, called this affiant and was informed by him that the defendant, the said Mrs. Bertha Jaeger Rutgers was then in his office, and that all of the terms and conditions of this affiant's offer was acceptable to the defendant, except that the defendant wanted \$40,000.00. This affiant thereon agreed and did increase his offer to the sum of \$37,500.00 all cash, and agreed to make

a new deposit of \$2,000.00, as suggested by the said Warner, said agent and attorney for the defendant. This affiant authorized the said Warner to make the changes in the written agreement theretofore signed by this affiant, and then in the possession of the said Warner, by increasing the price to \$37,500.00 all cash, with a deposit of \$2,000.00.

This affiant further deposes and says that on the same day late in the afternoon, he was informed by Mr. Warner that the defendant had accepted said written offer made by this affiant for his purchase of the said premises for the sum of \$37,500.00, all cash, and that he, the said agent, had the defendant sign her name to another form which conformed in all respects to the plaintiff's contract and he invited this affiant to stop by at his office the following day to leave a new \$2,000.00 deposit check and to pick up a copy of the Sales Contract, which had been signed by the defendant. This affiant further states that he visited the office of said Warner at the time specified and left a deposit check for the \$2,000.00 as agreed. Said Warner, however, refused to release the contract signed by the defendant which was then in his possession unless the affiant increased the price to \$40,000.00 and because the defendant had received another offer of \$40,000.00 after she had accepted plaintiff's offer.

/s/ Alexander Ostrower

[JURAT dated January 10, 1964]

[Filed February 6, 1964]

ORDER AND JUDGMENT

This cause having come on to be heard on Motion of the Defendant for a Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings, statements and affidavits of the parties hereto, and the Court having heard argument of counsel thereon, and having found that there is no genuine issue of fact to be submitted to the trial court, and having concluded that

the Defendant is entitled to judgment as a matter of law, it is hereby
ORDERED, ADJUDGED AND DECREED, that the said Motion for
Summary Judgment is in all respects granted and it is

FURTHER ORDERED ADJUDGED AND DECREED that the
Plaintiff's Complaint be and it is hereby dismissed on the merits.

/s/ John J. Sirica
Judge

[Certificate of Mailing]

[Filed March 5, 1964]

NOTICE OF APPEAL

Notice is hereby given this 5th day of March, 1964, that Alexander
Ostrower hereby appeals to the United States Court of Appeals for the
District of Columbia from the judgment of this Court entered on the 6th
day of February, 1964 in favor of Bertha Jaeger Rugers against said
Alexander Ostrower.

/s/ Herman Miller
Attorney for Plaintiff
* * *

[Certificate of Service]

Received from ALEXANDER OSTROWER
a deposit of THIRTY THOUSAND Dollars (\$30,000.00)
to be applied as part payment of the purchase of Lot 818 in Square 367, with
improvements thereon known as No. 1113-15 - 10TH ST. N.W. in the District of
Columbia, upon the following terms of sale:

Total price of property THIRTY THOUSAND AND 00/100
Dollars (\$30,000.00).

The purchaser agrees to pay THIRTY THOUSAND AND 00/100
Dollars (\$30,000.00)

cash at the date of conveyance, of which sum this deposit shall be a part.

The purchaser is to assume, give, place, take title subject to, a first deed of trust secured on
the premises of _____ Dollars (\$ _____)

due _____, 19____, bearing interest at the rate of _____ per cent
per annum, payable _____

The balance of deferred purchase money is to be secured by a _____ deed of trust on said
property, to be paid in monthly installments of _____ Dollars (\$ _____)
or more, including interest at the rate of _____ per cent per annum, each installment when so
paid to be applied, first, to the payment of interest on the amount of principal remaining unpaid
and the balance thereof credited to principal.

Trustees in all deeds of trust are to be named by the parties secured thereby.
The property is sold free of encumbrances except as aforesaid; title is to be good of record and in fact, subject, however, to covenants,
conditions, and restrictions of record, if any; otherwise said deposit is to be returned and sale declared off at the option of the purchaser,
unless the defects are of such character that they may readily be remedied by legal action, but the seller and agent are hereby expressly
released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such
action must be taken by the seller promptly at his own expense, whereupon the time herein specified for full settlement by the purchaser
will thereby be extended for the period necessary for such prompt action.

Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the
date of the transfer. Taxes, general and special, are to be adjusted according to the certificate of taxes issued by the Collector of Taxes of
the District of Columbia, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has
been levied or not, shall be paid by the seller or allowance made therefor at the time of transfer.

Examination of title, tax certificate, conveyancing, notary fees and all recording charges, including those for purchase money trust
if any, are to be at the cost of the purchaser; provided, however, that if upon examination the title should be found defective the seller
hereby agrees to pay the cost of examination of the title and also to pay to the agent herein a commission hereinafter provided for just
as though the sale had actually been consummated and all the terms of this contract complied with.

Within 60 days from the date of acceptance hereof by the owner, or as soon thereafter as a report
on the title can be secured if promptly ordered, the seller and purchaser are required and agree to make full settlement in accordance
with the terms hereof. If the purchaser shall fail so to do, the deposit herein provided for may be forfeited at the option of the seller,
in which event the purchaser shall be relieved from further liability hereunder, or without forfeiting the said deposit the seller may
avail himself of any legal or equitable rights which he may have under this contract. In the event of the forfeiture of the deposit, the
seller shall allow the agent one-half thereof as a compensation for his services to him.

Settlement is to be made at the office of _____ (Name of Broker)

Seller agrees to execute the usual special warranty deed. Property is sold subject to an existing tenancy as follows:
PARKING LOT, LEASE EXPIRES 12-31-63
Seller agrees to give possession at time of settlement and in the event he shall fail so to do he shall become and be thereafter a
tenant by sufferance of the purchaser and hereby waives all notice to quit as provided by the laws of the District of Columbia. (Strike
one of the two foregoing sentences.)

The risk of loss or damage to said property by fire or other casualty until the deed of conveyance is recorded is assumed by the seller.
All notices of violations of Municipal orders or requirements noted or issued by any department of the District of Columbia, or
prosecutions in any of the courts of the District of Columbia on account thereof against or affecting the property at the date of the
settlement of this contract shall be complied with by the seller and the property conveyed free thereof. This provision shall govern the
delivery of the deed hereunder.

The seller agrees to pay to _____ (Name of Broker)

his agent, a commission amounting to _____ and the
Title Company, or the Real Estate Office, through which settlement is made is hereby authorized and directed to make deduction of
the aforesaid commission from the proceeds of the sale and to make payment thereof to the said agent. Entire deposit to be held by
BRANDON H. WARNER, JR., ATT'Y. until settlement hereunder is made.
(Name of Broker)

The principals to this contract mutually agree that it shall be binding upon their respective heirs, executors, administrators or assigns.
This contract, ~~when ratified by the seller~~ contains the final and entire agreement between the parties hereto
and they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained.

Agent

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and
acknowledge it to be our contract.

Property is to be conveyed in the name of as directed

Alexander Ostrower
Purchaser.

Wife of Seller.

19____

Adm This offer is WITHDRAWN & NOT ACCEPTED BY THE
SELLER ON OR BEFORE NOVEMBER 18, 1963 AND THE DEPOSIT RETURNED
TO THE PURCHASER.

702

APPELLEE'S BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,548

ALEXANDER OSTROWER,

Appellant,

v.

BERTHA JAEGER RUGERS,

Appellee.

Appeal from the United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

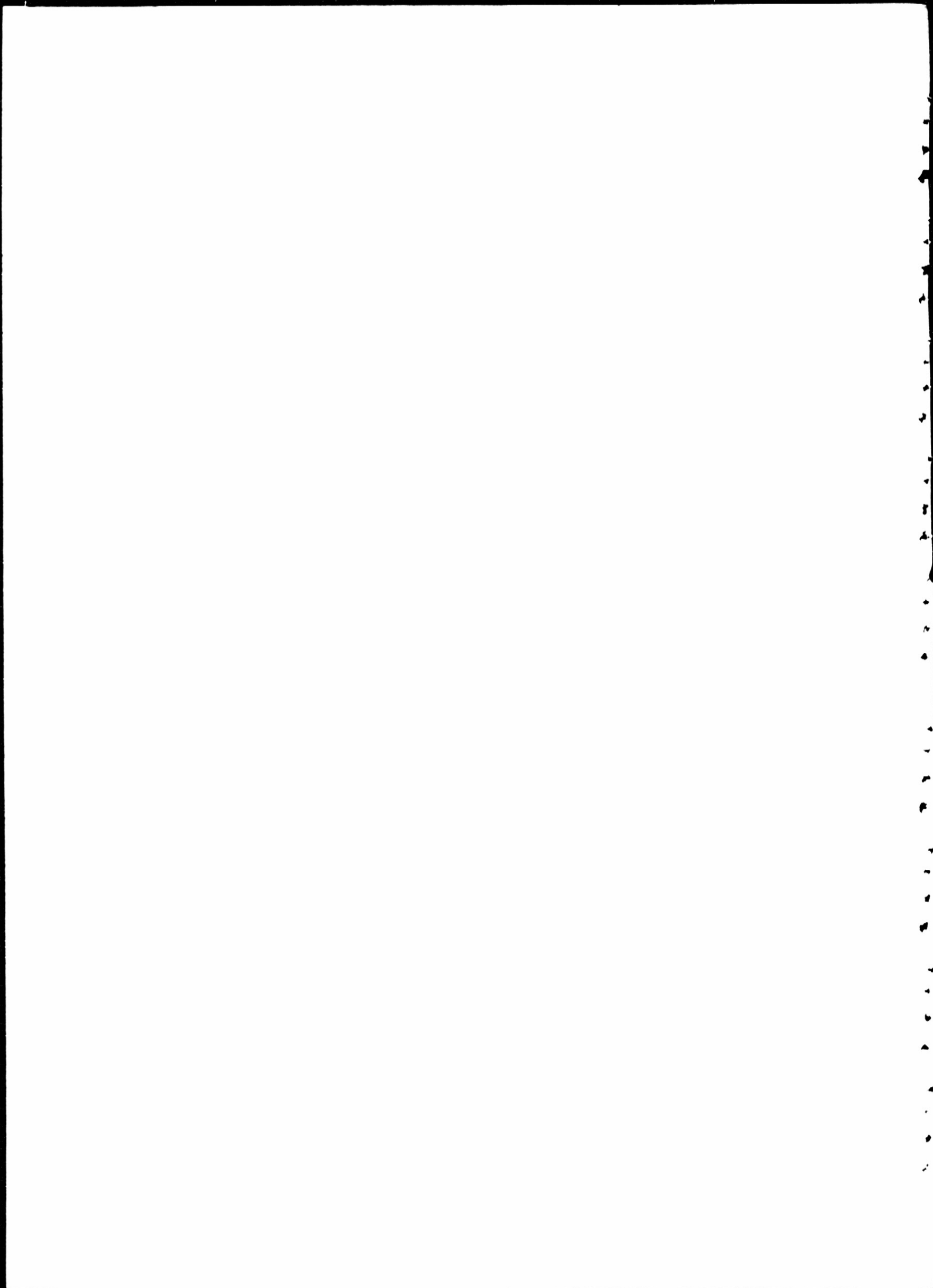
FILED JUN 19 1964

Nathan J. Paulson
CLERK

BRAINARD H. WARNER, III

919 - 18th Street, N. W.
Washington 6, D. C.

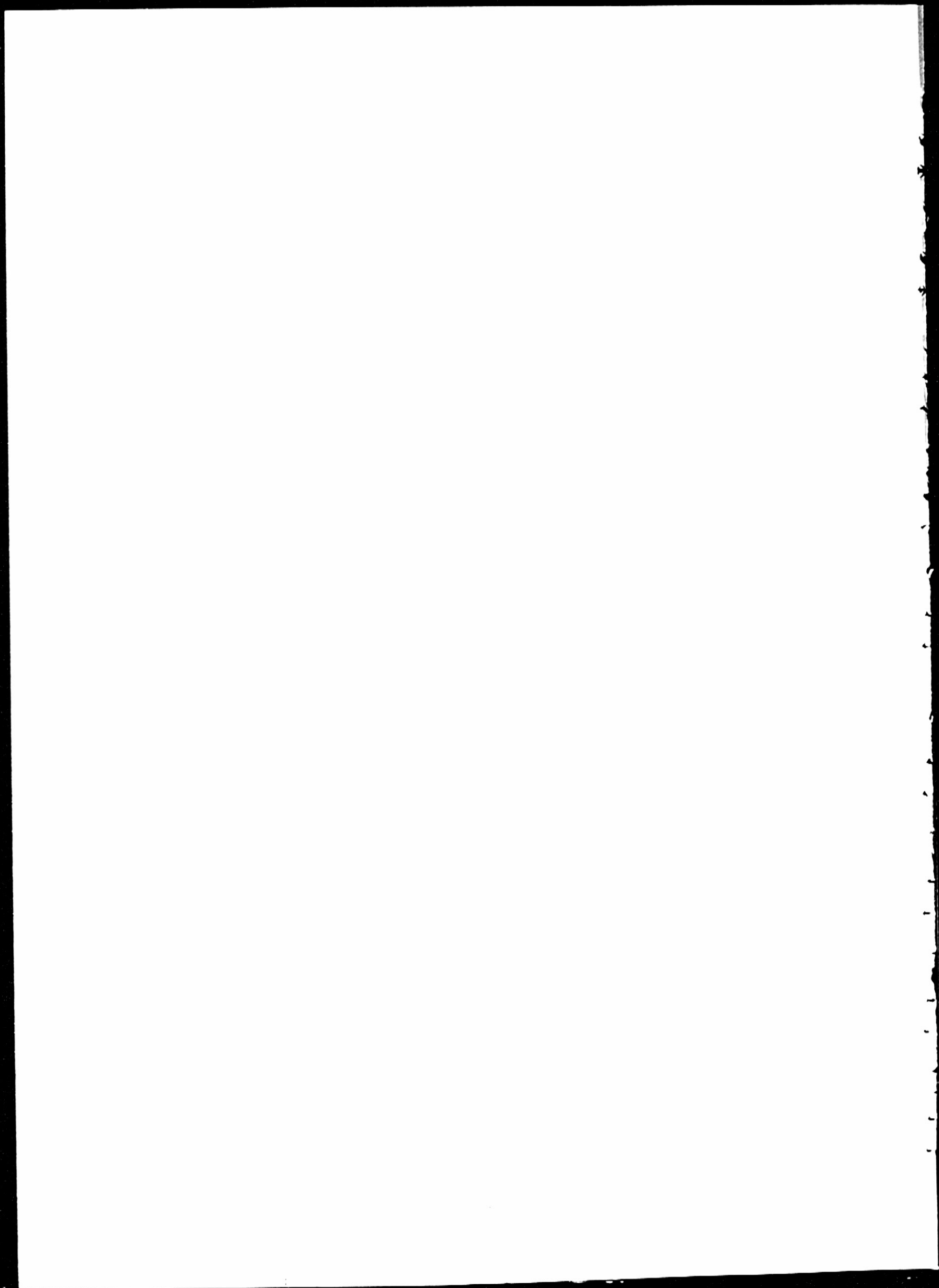
Attorney for Appellee.



(i)

STATEMENT OF QUESTION PRESENTED

That in the opinion of Appellee, the question presented is whether specific performance can be granted for the sale of real estate when the purchaser's offer is made by telephone to seller's attorney and seller's written acceptance thereof is withdrawn prior to any delivery to purchaser.

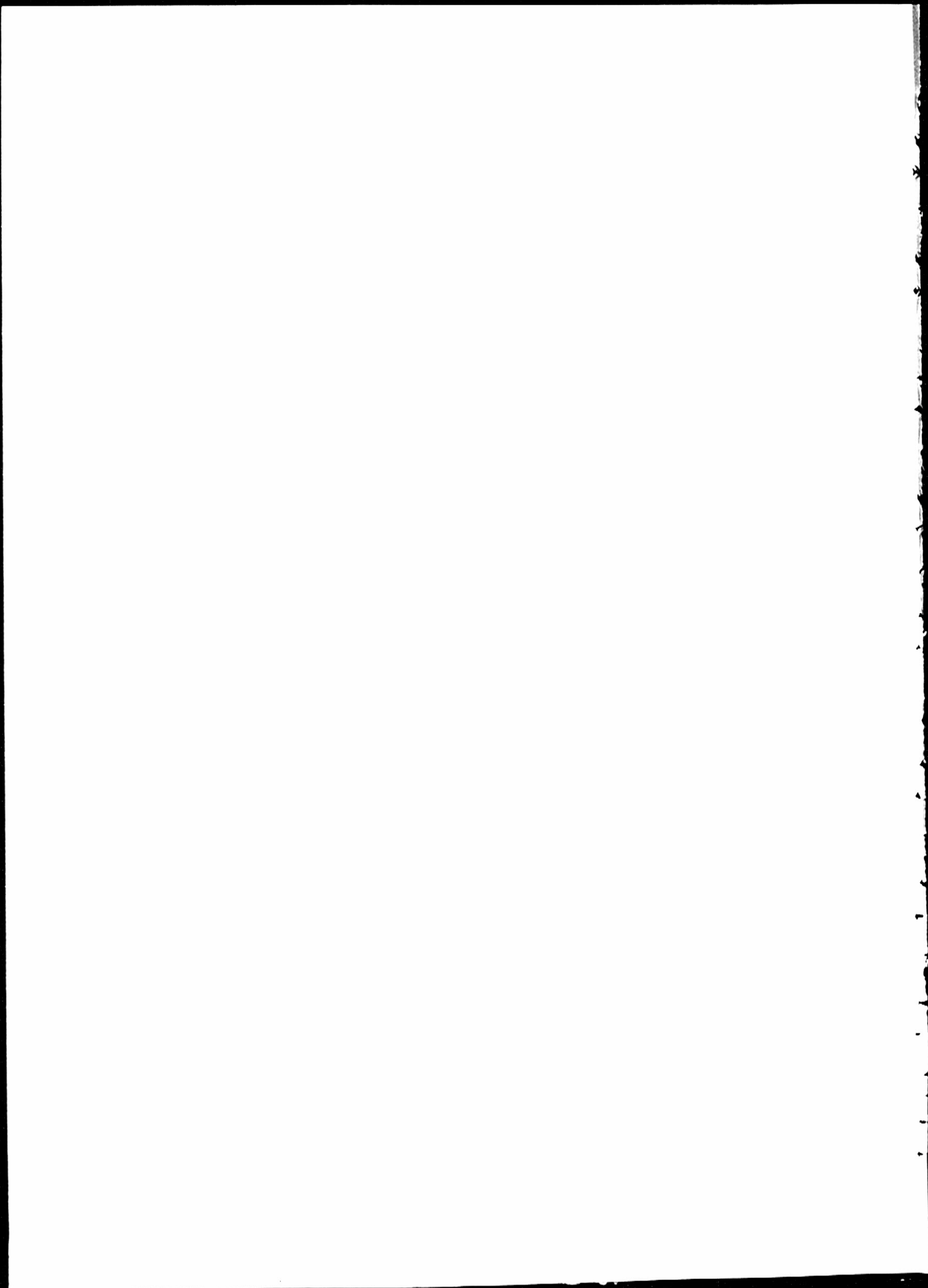


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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,548

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BERTHA JAEGER RUGERS,

Appellee.

Appeal from the United States District
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APPELLEE'S BRIEF

COUNTERSTATEMENT OF THE CASE

Appellant, Plaintiff below, desired to purchase the property known as 1113-15 - 10th Street, N. W., in the District of Columbia, from Appellee. The Appellant called Appellee by telephone and was referred to her attorney. (J.A. 7).

Several months later, on November 8, 1963, Appellant executed a written offer of \$30,000.00 for said property, and left the same with Appellee's attorney. (J.A. 10). This offer was made on a standard form sales contract which provided, in addition to the usual terms, that the offer was "Withdrawn if not accepted by the seller on or before November

18, 1963 . . ." (J.A. 10). When the offer was not accepted on November 19, 1963, Appellant made an oral offer on the telephone of \$37,500.00 for the property to Appellee's attorney. Later the same day, Appellee's attorney advised Appellant by telephone that the offer was acceptable, that Appellee had given him a signed contract and that Appellant could come to the office the following day and sign the contract for \$37,500.00 and make a deposit of \$2,000.00. (J.A. 4, 7).

Prior to Appellant's arrival, Appellee's attorney received an offer of \$41,000.00 for said property and, therefore, refused to consider any contract from Appellant for a lesser amount. (J.A. 4, 8).

The original offer of \$30,000.00 and the deposit were returned and Appellant left without executing any contract or making any written offer for \$37,500.00; nor did Appellant ever receive delivery of any contract signed by Appellee or her attorney. (J.A. 8).

STATUTE INVOLVED

Title 12, Section 302, of the District of Columbia Code.

SUMMARY OF ARGUMENT

1. There is no issue of fact.
2. There is no agreement in writing as required by the Statute of Frauds.

ARGUMENT

1. Appellant's brief states that there is an issue of fact, but neglects to point out what it is. The affidavits and evidence before the Court agree in all material respects. Whether or not a telephone offer by a purchaser, plus a written, but undelivered, contract signed by a seller is sufficient to satisfy the Statute of Frauds is a question of law.

2. The Statute of Frauds, Title 12, Section 302, of the District of Columbia Code, 1961 Edition, states as follows:

"No action shall be brought whereby to charge any person . . . upon any contract or sale of

lands, tenements, or hereditaments . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, which need not state the consideration, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

In the instant case, where is the agreement in writing? Where is the memorandum or note thereof signed by the Appellee, or by the Appellant? They do not exist.

While it is conceded here that Appellee signed an agreement, it is also conceded that the agreement was never delivered. (J.A. 8). It is clear that delivery is an essential element of execution and Appellant can find no applicable authority to the contrary. As Appellant states on page 7 of his brief, *Greenfield v. Murray*, 117 A.2d 227, D.C. Mun. App. is relied upon as clear authority for this principle. The Court states at page 229 of the opinion as follows:

"The rule is that when a contract in writing is involved, delivery must ordinarily be proved as an essential element of execution."

Certainly no factual difference between the *Greenfield* case and the case at bar would justify Appellant's assertion that "This case has no application" for a statement of a rule of law.

However, even if it is assumed that Appellee legally executed an agreement, the Appellant never signed the same agreement or any similar one. The only document signed by Appellant is the contract offer reproduced on page 10 of the Joint Appendix. As this offer was for only \$30,000.00 and was withdrawn on November 18, 1963, not even Appellant has argued that this was the written offer for \$37,500.00.

Instead, Appellant states on page 11 of his brief "that the telephone conversation" on November 19th between Appellant and Appellee's attorney (who is here styled as "Appellee's agent and broker") resulted in "a binding contract". As a telephone conversation cannot be said to be in writing, the so-called "binding contract" is the very type of contract

made unenforceable by the Statute of Frauds. Therefore, Appellant has in effect conceded that the Judgment below was correct and further argument and discussion of the cited authorities is unnecessary.

CONCLUSION

Wherefore, it is respectfully urged that the judgment of the lower Court be affirmed.

Respectfully submitted,

BRAINARD H. WARNER, III

919 - 18th Street, N. W.
Washington 6, D. C.

Attorney for Appellee.

